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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAY 04 2009
LIN 06 256 50514

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

M Quadrie
John F. Grissom
fo Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the sciences. The petitioner seeks employment as a "scientist-biologist." The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director found that the petitioner qualifies as a member of the professions holding an advanced degree, a finding that is statutorily equivalent to a finding that the petitioner qualifies as an alien of exceptional ability in the sciences. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on August 16, 2006, indicating that she was in the United States under a "Visitor" visa. The petitioner stated that her nonimmigrant status was due to expire on August 10, 2006, the day she signed the Form I-140 petition. USCIS records do not reflect any subsequent nonimmigrant visa petition filed by, or on behalf of, the petitioner, and the petitioner has not identified any U.S. employer. In August 2006 and again in May 2008, the petitioner applied for work authorization not through any valid nonimmigrant status, but as an alien with a pending adjustment application. The petitioner's current nonimmigrant status is, therefore, not clear from the available evidence.

The petitioner submitted a copy of an abstract from a presentation she made at a 2004 conference, and a color photograph showing the covers of several other publications. The record does not reveal the contents of these publications.

The petitioner submitted several witness letters with her petition. [redacted] of the Kutateladze Institute of Biochemistry, Tblisi, Georgia, described the petitioner as a longtime collaborator "whom I have known for ten years already." [redacted] stated that the petitioner's "unquestionable talent . . . has made her outshine not only the Institute in which she used to work, but also in various scientific circles in Georgia. She is versatile, extraordinary, and commands the interest of the leading scientists in our country." [redacted] provided no further details.

The petitioner submitted two letters from [redacted] who supervised the petitioner's doctoral dissertation work at the Georgian Academy of Sciences. In one letter, [redacted] described the petitioner as "a brilliant specialist" destined to be a "world leader" in her field. In his second letter, Dr. [redacted] detailed the petitioner's doctoral dissertation research: "She . . . studied chemical composition of persimmon . . . and . . . distinguished the phenolic compounds. This fact contributes to deepen our knowledge of chemical composition of plants and grows the prospect of persimmon usage, as a source of biologically active compounds."

In a joint letter, [redacted] and [redacted] stated that the petitioner "had been working at the Biochemistry Department at the State Agricultural-Economic University since April, 2004. She was distinguished as a hard-working person and had good authority with professors, teachers and students."

On November 1, 2007, the director issued a request for evidence (RFE), instructing the petitioner to submit documentation to meet the guidelines set forth in *Matter of New York State Dept. of Transportation*. The director requested evidence to establish the extent of the petitioner's influence on her field.

In response, counsel stated that the director had essentially requested "evidence to establish Exceptional Ability as defined under 8 C.F.R. § 204.5(k)(2). The Regulation defines Exceptional Ability as a degree of expertise significantly above that ordinarily encountered in the science[s], art or business." Counsel then argued that the petitioner qualifies as an alien of exceptional ability in the sciences. Exceptional ability, however, merely qualifies an alien to apply for the national interest waiver; it is not automatic evidence of eligibility for the waiver. The national interest waiver is a separate benefit, over and above the underlying immigrant classification. Therefore, eligibility for the waiver requires a separate showing that exemption from the job offer requirement would serve the national interest.

Counsel stated that the petitioner's "last job application was with the nationally recognized Stony Brook University . . . , where she has been seeking [an] Associate Professor Position in [the] Biochemistry Department. See Exhibit 3." Exhibit 3 is an electronic mail message from Stony Brook University, dated November 23, 2007, acknowledging receipt of the petitioner's résumé. The message does not

indicate that the petitioner applied for an "Associate Professor Position." Rather, the message refers to "the Postdoctoral Associate position."

A second message, dated December 6, 2007, indicated that the petitioner applied for an unspecified position at Brookhaven National Laboratory. The record does not indicate the outcome of either application. The messages confirming receipt of the applications are dated several weeks after the director issued the RFE in early November 2007. The timing of the applications suggests that the petitioner filed these applications as a reaction to the RFE.

Counsel stated: "science like every other endeavor of high skill requires constant and uninterrupted work in the area of expertise. Significant periods of inactivity in such work could and would bare [*sic*] adverse consequences for the qualifications of such professional." Significantly, although the petitioner claimed to have been in the United States since September 2005, nearly a year before she filed the petition, the record does not reflect any attempt by the petitioner to secure employment until after the director requested evidence of her impact in her field.

In the RFE, the director had requested published articles that discussed the petitioner's work (if such articles existed). The petitioner did not submit any articles by others that discussed her work. She did, however, submit copies of four of her own published articles. All four articles were published between 2002 and 2004. Given counsel's assertion regarding the importance of "constant and uninterrupted work in the [petitioner's] area of expertise," it is significant that the petitioner seems to have ceased producing new work well before she filed the petition in mid-2006.

The petitioner submitted copies of previously submitted letters, as well as three new letters containing very general praise for the petitioner. As with the first group of letters, these letters are all from witnesses in the Republic of Georgia. In a joint letter, [redacted] and [redacted] of Tbilisi State University praised the petitioner as "a diligent and active student" who "can undertake scientific-research and administrative activity as well."

The remaining two letters, respectively signed by [redacted] and [redacted] of the Durmishidze Institute of Biochemistry and Biotechnology, Tbilisi, are identical except for portions of their first, introductory paragraphs. Both letters referred to the petitioner as an "enthusiastic and purposeful scientist with excellent capabilities for experimental work. She has comprehensive theoretical knowledge especially in the field of modern Biochemistry and Biotechnology, which allows her to conceive new and interesting approaches to scientific problems."

The director denied the petition on August 13, 2008, stating that the petitioner had failed to establish the national scope of her work, or that her work has been particularly influential outside of the institutions where she has worked or studied.

On appeal, counsel states that the "director's decision violates petitioner's statutory and constitutional rights" because the director imposed unreasonable burdens on the petitioner and relied on "very

contradictory" arguments. Counsel asserts that the director's findings are not consistent with the statute, regulations or case law.

Counsel argues: "The Director . . . erred as a matter of law and fact in concluding Petitioner did not qualify for classification under Section 203(b)(2) of the Immigration and Nationality Act." The director, however, made no such finding. In the third paragraph of the decision, the director clearly stated: "the alien petitioner qualifies as a member of the professions holding an advanced degree." This language amounts to a finding that the petitioner qualifies for the underlying classification sought. Counsel objects that the director made no finding that the petitioner qualifies as an alien of exceptional ability in the sciences, but such a finding would be moot in the face of the director's acknowledgment that the petitioner is a member of the professions holding an advanced degree. An additional finding of exceptional ability would be of no benefit to the petitioner and would serve no constructive purpose in this proceeding. Accordingly, the AAO will not discuss the details of counsel's argument regarding the petitioner's claim of exceptional ability in the sciences.

Counsel contests the director's finding that the petitioner's work lacks national scope. We agree with counsel that published scientific or medical research is national rather than local in scope. The petitioner's recent apparent inactivity in her field affects her personal impact on her field, but not the fundamental reach of her type of work. The AAO therefore withdraws the finding that the petitioner has not established the national scope of her occupation.

The petitioner cannot, however, so easily overcome the final obstacle to eligibility. Counsel's arguments regarding the impact of the petitioner's work in her field are not persuasive, and sometimes lack coherence. Counsel states:

> [The director concluded] that Petitioner failed to show that her "scholarly articles have been cited by other researchers at a beyond-exceptional rate." However, this conclusion makes no sense in light of the fact that the Director acknowledges in the same paragraph that "the petitioner has conducted original researches, and has published the results of her researches in learned journals." The fact that Petitioner has conducted original research and published scholarly articles in learned journals demonstrates her work would serve as a national interest [*sic*] that is substantially greater than would be produced by a United States worker.

(Citations omitted.) There is no dispute that the petitioner has published original articles. The existence of those articles, however, tells us nothing about the field's subsequent response to the petitioner's work. The director was quite correct in finding that the petitioner submitted no evidence to show that other researchers, in their own articles, have cited the petitioner's work. There is simply no logical basis to assume, as counsel demands, that the very existence of published work by the petitioner forces us to presume that other researchers have heavily cited the petitioner's work.

We turn now to this claim by counsel: "The fact that Petitioner has conducted original research and published scholarly articles in learned journals demonstrates her work would serve as a national

interest [*sic*] that is substantially greater than would be produced by a United States worker." This is a rather startling proposition on counsel's part. The petitioner's field of endeavor, after all, is biological research. A fundamental goal of biological research is to uncover and disseminate new information in the field of biology. Yet counsel, here, asserts that the petitioner stands apart from her peers because she has uncovered and disseminated new information. Thus, counsel begins with the tacit presumption that qualified United States biological researchers generally do not "conduct[] original research" or "publish[] scholarly articles." Counsel does not provide any evidence to support this argument. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, counsel's claim that the petitioner is an exceptionally productive researcher is difficult to defend, given that the petitioner apparently produced no new work in the four years prior to the appeal.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.